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In the Supreme Court of the United States

OCTOBER TERM, 1979

THE AKRON, CANTON & YOUNGSTOWN RAILROAD CO., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission and the court of appeals correctly concluded that the Interstate Commerce Act requires petitioners, the major Eastern railroads, to publish tariffs for the transportation of radioactive wastes and spent nuclear fuel, in view of the fact that petitioners for more than 20 years have carried these materials for governmental and private shippers.

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*The other petitioners are: The Baltimore and Ohio Railroad Company; Bangor and Aroostook Railroad Company; Bessemer and Lake Erie Railroad Company; Boston and Maine Corporation, Robert W. Meserve and Benjamin H. Lacy, Trustees; Central Vermont Railway, Inc.; The Chesapeake and Ohio Railway Company; Consolidated Rail Corporation; Delaware and Hudson

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Railway Company; The Detroit and Toledo Shore Line Railroad Company; Detroit, Toledo and Ironton Railroad Company; Grand Trunk Railway System; The Long Island Railroad Company; Maine Central Railroad Company; Norfolk and Western Railway Company; The Pittsburgh and Lake Erie Railroad Company; Richmond, Fredericksburg and Potomac Railroad Company; and Western Maryland Railway Company.

Additional respondents are: Commonwealth Edison Company; Houston Lighting & Power Company; Kansas City Power and Light Company; Kansas Gas and Electric Company; Niagara Mohawk Power Corporation; Northern States Power Company; Pacific Gas and Electric Company; Pennsylvania Power & Light Company; Philadelphia Electric Company; Public Service Company of Indiana, Inc.; Rochester Gas and Electric Corporation; Southern California Edison Company; Union Electric Company; Vermont Yankee Nuclear Power Corporation; Virginia Electric & Power Company; and GPU Service Corporation-Holding Company for Jersey Central Power & Light Company, Metropolitan Edison Company; Pennsylvania Electric Company; Energy Research and Development Administration (now the Department of Energy); and the Power Authority of the State of New York.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b-15b) is reported at 611 F. 2d 1162. The opinion of the Interstate Commerce Commission (Pet. App. 1c-3c) is reported at 359 I.C.C. 639. The initial decision of the administrative law judge (Pet. App. 1d-21d) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1e) was entered on December 20, 1979. On March 3, 1980, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including May 19, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

For more than 20 years, all of the nation's major railroads have transported spent nuclear fuel and radioactive wastes for government agencies and private parties (Pet. 8 n.18; Pet. App. 8d). The railroads have transported those materials for government agencies under Section 22 of the Interstate Commerce Act, now codified at 49 U.S.C. (Supp. II 1978) 10721,[1] which allows a carrier to charge the government special rates that are exempt from regulation by the Interstate Commerce Commission (Pet. App. 8d). The transportation for private parties has been offered or performed by petitioners, the Eastern railroads, under private contracts. Petitioners have not filed tariffs for that transportation under Section 6(1) of the Act, 49 U.S.C. (Supp. II 1978) 10762 (Pet. 8 n.18; Pet. App. 9d).

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[1]In 1978, the Interstate Commerce Act was revised, recodified and reenacted without substantive change as Subtitle IV of Title 49 of the United States Code, Pub. L. No. 95-473, 92 Stat. 1337, 49 U.S.C. Supp. II 1978) 10101 *et seq.*

Since 1962, the Uniform Freight Classification Committee, a classification bureau representing all of the nation's railroads, has filed with the Commission tariffs that have effectively established "class rates" covering the transportation of spent nuclear fuels and radioactive wastes (Pet. 7).[2] The Southern and Western Railroads have transported such materials for private shippers under these tariffs since 1962. Petitioners, however, have consistently "flagged out" or refused to participate in the tariffs. Instead, petitioners have continued to require private shippers in their service territories to make "special arrangements" with respect to each and every shipment of spent nuclear fuel or radioactive wastes. Recently, these arrangements have required, *inter alia*, that the shippers accept a costly special train service. In administrative proceedings at which petitioners and the nation's other major railroads participated, the Commission found that safety considerations did not require that service (Pet. App. 11b-12b).[3]

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[2]The Uniform Freight Classification Committee publishes tariffs that provide "classification ratings" for all commodities. Other rate bureaus, which represent railroads in discrete geographical territories, file tariffs establishing "class rates" for each class in the Uniform Freight Classification. The geographical rate bureaus and individual carriers may also establish "commodity rates" for special commodities. Those rates are generally lower than the class rates that would otherwise apply to the commodities. If a commodity rate has not been established, the class rate applies.

In this case, petitioners' refusal to join the inclusion of nuclear waste materials in the Uniform Freight Classification has resulted in their having on file no tariff, for either a class or commodity rate, covering the transportation of these materials.

[3]*Radioactive Materials, Missouri-K.-T. R.R.*, 357 I.C.C. 458 (1977); *Radioactive Materials, Special Train Service, Nationwide*, 359 I.C.C. 70 (1978).

In 1976, the Energy Research and Development Administration (now the Department of Energy) and a number of private Eastern utilities filed complaints with the Commission contending that petitioners' "flag outs" were unlawful, and asking that the Commission order petitioners to file tariffs covering the transportation of spent nuclear fuels and radioactive wastes (Pet. 9). Based on the fact that they had never filed tariffs covering this transportation, petitioners asserted that they were private carriers—rather than common carriers—as to these materials, and thus were not subject to the Commission's jurisdiction (*ibid.*).

An administrative law judge rejected petitioners' contentions (Pet. App. 1d-21d), and the Commission adopted the law judge's determination (Pet. App. 1c-3c). The Commission found that petitioners had a common carrier and statutory obligation to transport the materials. Consequently, the Commission ordered petitioners to cancel their "flag outs" and file reasonable and otherwise lawful tariffs covering the transportation. The Commission also found that petitioners' special train requirements could not be justified on safety grounds. The Department of Transportation and the Nuclear Regulatory Commission, the two agencies with expertise and responsibility in this area, had established applicable safety requirements that did not include special train service, and the Commission had independently concluded that such service was not required (Pet. App. 3c).[4]

The court of appeals affirmed (Pet. App. 1b-15b). The court specifically rejected petitioners' contention that they were not common carriers as to these materials, and thus not subject to the Commission's jurisdiction, simply

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[4]See note 3, *supra*.

because they had never filed a tariff covering them (Pet. App. 6b-11b). The court acknowledged that a railroad may be a common carrier as to some commodities and yet be regarded as a private carrier as to others when, "*as a matter of accommodation or special engagement*, [the carrier] undertakes to carry something which it is not [its] business to carry" (Pet. App. 9b (emphasis by the court), quoting from *Railroad Co.* v. *Lockwood*, 84 U.S. (17 Wall.) 357, 377 (1873)). Relying on this Court's decision in *Kansas City So. Ry.* v. *United States*, 282 U.S. 760, 764 (1931), however, the court of appeals rejected petitioners' assertion that a carrier may escape its common carrier and statutory obligations merely by calling itself a private carrier (Pet. App. 6b-7b). Based on the particular facts of this case, the court concluded that petitioners had common carrier obligations by virtue of both "the long history of [their] carriage of nuclear materials" (Pet. App. 9b) and the policies and requirements of the Interstate Commerce Act, which impose obligations on railroads that are not limited to those under the pre-existing common law (Pet. App. 9b-11b).[5]

ARGUMENT

This case presents no conflict among the circuits or any issue of general importance warranting this Court's review. The court of appeals correctly held that the Commission did not exceed its authority in ordering petitioners to cancel their "flag outs" from the Uniform

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[5]In the court of appeals, petitioners made several other arguments that were properly rejected and are not renewed here. For instance, the court of appeals found no merit to petitioners' suggestion that the Commission's order requiring them to publish tariffs improperly required them to provide additional service or facilities (Pet. App. 3b-6b). The court was also correct in rejecting petitioners' contention that the Commission had given inadequate consideration to safety factors (Pet. App. 11b-15b).

Freight Classification and to publish tariffs at the class rate level for the carriage of spent nuclear fuel and radioactive wastes.

1. Petitioners' principal contention (Pet. 12-18) is that the Commission and the court of appeals erroneously held that a railroad that is a common carrier as to some commodities is therefore deemed a common carrier as to other commodities. Petitioners' claim lacks merit because both the Commission and the court of appeals clearly acknowledged that a railroad that is a common carrier as to some or even most commodities may not be a common carrier, and thus not subject to the Commission's rate jurisdiction, as to other special or unique commodities that are "not [the carrier's] business to carry" (Pet. App. 9b, quoting *Railroad Co.* v. *Lockwood*, 84 U.S. (17 Wall.) 357, 377 (1873)). The conclusions of the Commission and the court of appeals in this case rest not on petitioners' carriage of other commodities, but on petitioners' "long history" (Pet. App. 9b) of providing carriage to the complaining parties for the very materials at issue.

2. Petitioners also contend (Pet. 18-25) that the court of appeals erred in holding that petitioners are in fact common carriers as to nuclear waste materials within the meaning of the Interstate Commerce Act. That contention is both fact-bound and incorrect.

a. The court of appeals' conclusion that petitioners are common carriers as to nuclear waste materials is correct even under traditional common law standards.

Petitioners cannot and do not dispute the fact that they have carried these materials for private shippers for many years. Neither do they contend that they have refused to carry these materials for shippers wishing their service or that they now wish to discontinue providing this service.

To support their assertion that they are not "common carriers" subject to the provisions of the Act (*e.g.*, the prohibitions against discrimination, unreasonable rates, and undue preferences) and the Commission's rate jurisdiction, petitioners rely only on the fact that they have never filed a tariff for those services. In effect, petitioners argue that they are not common carriers, despite their actual conduct, merely because they have not chosen to call themselves common carriers with respect to the carriage of these materials.

Petitioners have cited no cases, however, under either the common law or the Act, to support their contention that carriers may avoid common carrier obligations simply by failing to file tariffs or by calling themselves private carriers. Indeed, as the court of appeals noted (Pet. App. 6b-7b), this Court expressly rejected such a contention in *Kansas City So. Ry.* v. *United States*, 282 U.S. 760, 764 (1931), stating that "a common carrier dealing with transportation that is subject to the Act cannot escape its statutory obligations by calling itself a private carrier as to such transportation." See also *United States* v. *ICC*, 288 F. 649, 654 (D.C. Cir. 1923), aff'd, 265 U.S. 292 (1924) (the failure to file a tariff with the Commission does not establish that a railroad is not a common carrier).[6] Accord, *Railroad Co.* v. *Lockwood*, *supra*; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U.S. 397 (1889).[7]

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[6]This principle is consistent with common law decisions imputing common carrier status to carriers that price their services through individual contracts rather than tariff publications. See, *e.g.*, *Jackson Architectural Iron Works* v. *Hurlbut*, 15 Misc. 93, 36 N.Y.S. 808 (N.Y.C. Ct. C.P. 1895); *Weaver* v. *Public Service Commission*, 278 P. 542, 544 (Wyo. Sup. Ct. 1929).

[7]It is obviously not the filing of a tariff that determines whether a railroad is holding itself out as a common carrier. Common carriage obligations existed well before the passage of the Act, which first required the filing of tariffs.

In sum, the obligation of common carriage under both the common law and the Act turns neither upon the carriers' self-description nor upon the formalism of a tariff filing, but upon whether the carrier has in fact offered the transportation services to shippers on a general and continuing basis. The undisputed facts here support the Commission's conclusion, affirmed by the court of appeals, that petitioners have done so.

b. The court of appeals correctly concluded that, in any event, the "common carrier" obligations that the Act imposes on railroads are not rigidly confined to pre-existing common law concepts, but also derive from the purposes of the Act and the National Transportation Policy set forth in the Act. See 49 U.S.C. (Supp. II 1978) 10101.

As noted above (see pages 5-6, *supra*), the court of appeals' determination reflects the traditional common law standards. Moreover, as the court observed (Pet. App. 10b-11b), the enactment, modification and interpretation of the Act has had a significant impact on the definition of the statutory term "common carrier." Although the Act does not define common carriage, the concept did not cease to develop in 1887; the statutory language and the case law interpreting it have necessarily shaped the relevant definition of common carriage. Thus, the court of appeals correctly cited the National Transportation Policy (Pet. App. 10b), enacted by the Transportation Act of 1940, ch. 722, 54 Stat. 898, 899, noting that "[t]he railroads' common-carrier duties in the carriage of nuclear materials must be seen to flow from their role in effecting the National Transportation Policy" (Pet. App. 10b). The court's interpretation does not read the "common carrier" language out of the Act, as petitioners assert (Pet. 22), but merely recognizes that a

substantial body of law has developed since 1887 to shape the scope of "common carriage" by railroad. Petitioners' position, if accepted, would improperly freeze the agency's ability "to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Ass'ns* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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